No. 21,027

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOM JOHNSON, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order issued against respondent on October 20, 1965. The Board's Decision and Order (R. 38-46)[1] are reported at 154

[1] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume 1, pleadings" are designated "R." References to portions of the stenographic transcript reproduced pursuant to rules 10 and 17 of this Court are designated "Tr." "GC Exh." refers to exhibits of the General Counsel; "R. Exh." refers to respondent's exhibits. Whenever, in a series of references, a semicolon appears,

NLRB 1352. This Court has jurisdiction, the unfair labor practices having occurred at Stateline, Nevada, within this judicial circuit. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that respondent violated Sections 8(a)(1) and (5) of the Act by bargaining directly with certain of its employees, by unilaterally changing their rates of overtime pay without consulting with the Union [2] at a time when the Union was the representative of the employees in an appropriate bargaining unit, and at the same time threatening employees with the loss of overtime employment. In addition, the Board found that respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Will Hoskins and Niilo Utra because they engaged in protected concerted activities. The facts upon which the Board based its findings are summarized below.

A. *Background; the Company's unilateral changes in overtime pay*

The Company is a Nevada corporation with its principal office at Reno, Nevada, where it is engaged in business as a painting contractor (R. 14). In March 1961, the Company contracted with Harvey's

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references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Painters Union Local No. 567, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO.

Wagon Wheel, Incorporated, to perform all the interior and exterior painting, paperhanging, and sheet-rock taping[3] at the newly constructed Wagon Wheel Hotel in Stateline, Nevada. The contract was of the cost plus 10 percent type, that is, Wagon Wheel agreed to reimburse the Company for its expenditures for labor and materials and then to add 10 percent of these expenditures as its fee (R. 13; Tr. 65-68).

On July 1, 1962, the Union called a strike against the Company and the other members of the Reno Chapter, Painting and Decoration Contractors of California and Nevada, Inc., a voluntary association of employers engaged in painting-contractor work. The strike ended on August 5, 1962, and a collective bargaining agreement between the parties was adopted effective August 6, 1962. (R. 14, 16, 17; Tr. 38). The collective bargaining agreement provided, *inter alia*, that double time would be paid for weekends and holidays, with certain limited exceptions.[4]

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[3] Taping involves treating the sheet-rock walls with Perfa tape and cement compound in preparation for painting or paperhanging (Tr. 74).

[4] The provision of the collective bargaining agreement on overtime reads as follows. (GC 3, Section 2—Overtime p. 16).

> A. New commercial work, first 4 hours during each week day—time and a half.
>
> B. After 4 hours of overtime each week day—double time during week.
>
> C. Saturday, Sunday, and holidays, double time except on subsistence jobs, Saturday to be time and one-half.

On December 6, 1962, Duane Johnson, the Company's general manager, conducted a meeting of all the employees, including Foremen Fred Schultz and Bob Cleveland, in the paint shop at quitting time. Johnson informed the employees that he had met with Harvey Gross, owner of the Wagon Wheel, and that the latter had told Johnson that he would no longer pay double time for overtime work. Johnson said that if the painters wanted further overtime work they would have to sign an agreement stating that they would work for time and a half instead of double time. He added that if they refused to sign the agreement, he would hire additional employees and thereby eliminate overtime. Johnson then circulated a statement among the employees, explaining that this statement was an agreement under the terms of which the employees would work for time and a half instead of double time. A number of the employees signed the agreement. Employee Will Hoskins, however, said that he "wouldn't sign the damn thing." Johnson thereupon grabbed the agreement away from Hoskins and said that Hoskins did not have to sign it since he was paid subsistence (*infra*, n. 5) and he received only time and a half for overtime in any event (R. 19, 21-22; Tr. 45-51, 118-122, 118-135, 140-143, 157-162).

B. *The discharge of Niilo Utra*

Utra began working for the Company on August 27, 1963. His first assignment was painting outdoor balconies at the motel at a rate of $4.10 an hour (R. 17; Tr. 82-84). When Utra received his first

paycheck, he asked his foreman, Fred Shultz, why he had not received subsistence.[5] Shultz replied that Utra was not entitled to subsistence because he had been hired locally.[6] After he had been on the job for about 2 months, Utra began to suspect that Wagon Wheel was paying subsistence to the Company for him and other employees and that the Company was keeping the money instead of paying it to them. Utra managed to look at the books kept by Wagon Wheel's timekeeper and learned that Wagon Wheel was in fact paying $8 subsistence per day for him and that his hourly wage was listed on the Wagon Wheel books at $4.25 (R. 17; Tr. 85-86).[7]

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[5] The collective bargaining agreement between the Association and the Union provided as follows (GC 3, p. 18):

> Subsistence—any employee working a job sufficiently removed from the Reno-Sparks area so that he is required to live at the job site shall be paid not less than the regular rates of pay, plus Eight Dollars ($8) per day as subsistence . . .
>
> 1. Subsistence shall be paid for all days that the employee is stationed at the job area including Saturdays, Sundays and holidays.
> 2. The only exception to the subsistence shall be when the employee has established a residence in the subsistence area no less than six (6) weeks prior to the starting date of the job.

Utra is a resident of Palo Alto, California, a city about 200 miles from Stateline, the situs of the job (R. 17).

[6] Utra had been hired in Bijou, California, approximately 2 miles from the job situs (R. 17).

[7] Records introduced at the hearing by stipulation indicate that during the period November 29, 1962-April 10, 1963, the Company received $104,190.76 from Harvey's Wagon Wheel

On the following day, Utra confronted Johnson at the Wagon Wheel and asked him about the subsistence. Johnson answered, "You got me" (R. 17; Tr. 87). Johnson told Utra to figure the amount of subsistence and wages which the Company owed him. The next day Utra told Johnson that he believed the Company owed him $504 subsistence and $50 in wages (R. 17; Tr. 87-91). On the following day, Johnson informed Utra that he was not entitled to the subsistence money, that the Company had collected the money by mistake, and that he (Johnson) was going to return this money to the Wagon Wheel. Johnson then asked Utra whether he wanted to work for the Company all winter. Utra replied that he did. Johnson directed Utra to secure a referral slip from the union office in Reno. Utra did as he was told and secured a referral slip from Gene Crumley, the Union's business representative (R. 17, 18; Tr. 94-100). Thereafter, Utra received subsistence pay (R. 18; Tr. 100-101).

Shortly thereafter, Utra complained to Business Representative Crumley about the unpaid subsistence and wages. Crumley stated that Johnson would have to pay the back wages and subsistence claimed by Utra. Utra asked Crumley to assist him in pressing his claim. On January 7, 1963, Utra wrote a letter to the Union's national headquarters in Lafayette, Indiana, stating that he had not yet re-

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for employees' wages. However, instead of paying all of this money to its employees, the Company retained approximately $12,000 for itself, paying only $92,155.44 total salary expenses during this period (R. 19; Tr. 14-18, 26-27, GCX 4, 6, 7).

ceived the subsistence pay due him and requesting the International's assistance in pressing his claim. On January 9, William H. Rohrberg, the Union's general secretary-treasurer, referred Utra's letter to Gene Crumley for appropriate action (R. 18; GCX 10, 11). On January 24, 1963, Johnson told Utra that he had heard that the latter had pressed his claim for subsistence pay with the International. Johnson told Utra that he believed that Gene Crumley would be afraid to press the claim against Johnson because Johnson had "friends" who would "back him up." Johnson then offered to write Utra a check for the full amount due him if Utra would endorse the check and return it to him. Utra refused. Johnson cursed Gene Crumley and said to Utra, "You had better start digging your grave" (R. 41, 20-21; Tr. 107-109, 110-111).[8]

On the following day, January 25, 1963, Utra was laid off. Duane Johnson, the Company's general manager, testified that he personally laid off Utra "because of lack of work in his particular field," and

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[8] In his testimony, Johnson acknowledged that this conversation had taken place and that he had opened the conversation by referring to Utra's having complained to the International Union concerning the subsistence pay owed him. Johnson also acknowledged that he had offered to repay Utra the money and had subsequently rescinded the offer. However, Johnson denied that he had threatened to fire Utra and stated that Utra had asked him to hold the subsistence money on his behalf so that he (Utra) would not gamble it away (Tr. 171-172). The Trial Examiner specifically discredited Johnson's testimony that Utra had asked him to hold the money for him (R. 21). The Board credited Utra's version of the conversation (R. 41).

that, when he laid Utra off, he told him that "work had slowed down" (Tr. 175-176). Utra's "particular field" was outside painting (R. 41; Tr. 185). Foreman Fred Shultz testified, however, that he, and not Duane Johnson, had laid Utra off, and that the reason for his layoff was poor enameling work. Shultz acknowledged that the enameling had been completed in early or the middle part of January and that he had not mentioned Utra's work in any way when he laid him off (R. 41; Tr. 215-219).

About a month after his layoff, Utra received a check for $504 from Duane Johnson. On the back of the check was the following notation: "Paid under protest" (GCX 12).

C. *The discharge of Will E. Hoskins*

Hoskins was hired by Duane Johnson as a painter in June 1962 (R. 18; Tr. 37-39). Hoskins worked as an outside painter until November 1, and was then assigned to staining in the interior of the hotel (Tr. 42).

As noted above, Hoskins attended the December 6, meeting of the employees, at which General Manager Duane Johnson informed them that he would no longer pay double time for overtime work. Johnson insisted that the employees sign an agreement to work overtime at time and a half and threatened to cut off all overtime work if they did not sign the agreement. As noted *supra*, when the agreement was passed to Hoskins, he turned to Duane Johnson and said that he "wouldn't sign the damn thing." Johnson grabbed

the paper away from Hoskins and said that he did not have to sign it (Tr. 48-50).

On the following day, Hoskins telephoned Gene Crumley, the Union's business agent, and told him that Duane Johnson was forcing the employees to work for time and a half, instead of doubletime, as provided in the agreement. Several days later, Crumley visited the job site and informed Johnson that the Union would insist that Johnson abide by the overtime provisions of the collective bargaining agreement (R. 40; Tr. 50-55).

On December 13, Duane Johnson called another meeting of the employees and said that one of his employees "had started a big line of BS." Then, looking directly at Hoskins, Johnson said that one of the employees "had put Crumley on his back," and that if he (Johnson) learned the identity of the employee he would fire him "not because he went to the Union, but he would find other reasons" (R. 40; Tr. 55-57). As Johnson was leaving the meeting, he pointed to Hoskins and said, "I want you to remember that" (R. 40; Tr. 56, 122-123).

On the following day, December 14, Foreman Fred Shultz informed Hoskins that he was being laid off and "it wasn't because of [his] work, but they were laying off everybody that was drawing subsistence (R. 40; Tr. 58). In fact, as the Company's own payroll records clearly show, employees, including painters, who were drawing subsistence pay continued to be employed by respondent as late as April 17, 1963, 4 months after Hoskins' layoff (R. 40; GCX 8, payroll nos. 75 through 91). Shultz had never said any-

thing to Hoskins indicating that he was dissatisfied with Hoskins' work (R. 40; Tr. 61, 232).

Several days after he was laid off, Hoskins returned to the job site, claiming that Duane Johnson owed him about $70 in back wages and subsistence. After some discussion, Johnson and Hoskins compromised the amount and Johnson gave Hoskins a check for $46. As he gave Hoskins the check, Johnson said, "Before you go squawking to Crumley, I want you to remember that I paid you $4.35 an hour which is above union scale" (Tr. 59-61).

II. The Board's Conclusions and Order

On the foregoing facts, the Board, in agreement with the Trial Examiner, found that respondent violated Section 8(a)(1) and (5) of the Act by dealing directly with the employees without consulting with the Union at a time during which the Union was the exclusive representative of the employees, and at the same time threatening the employees with loss of overtime employment. The Board further found that respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Utra and Hoskins because they engaged in protected concerted activities.[9]

The Board's order (R. 43-46) requires respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the

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[9] The Trial Examiner had concluded that the evidence was insufficient to sustain the allegations that the discharges of Utra and Hoskins violated Section 8(a)(3) and (1) of the Act (R. 24). See *infra*, pp. 20-22.

exercise of their rights guaranteed by Section 7 of the Act. Affirmatively, respondent is required to notify and bargain with the Union with respect to any changes in the rates of overtime pay, or with respect to any other changes in the terms and conditions of employment of its employees, and to make whole any of its employees employed at the Wagon Wheel project between December 1, 1962, and April 1, 1963, for any loss of overtime pay which such employees may have suffered because of respondent's unlawful change in the rates of their overtime pay. Respondent is further required to make whole employees Utra and Hoskins for loss of earnings they may have sustained by virtue of their respective unlawful discharges while employed at the Wagon Wheel project in the period beginning with their respective dates of discharge and ending April 1, 1963. The order also directs respondent to notify employees Hoskins and Utra that they will be considered eligible for preferential hiring at any of respondent's projects if they should choose to apply for employment at any of such projects. Respondent is also required to post the usual notices and to mail copies of such notices to employees Hoskins and Utra.

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That Respondent Violated Section 8(a)(1) and (5) of the Act by Bargaining Directly With Certain of Its Employees, by Unilaterally Changing Its Employees' Conditions of Employment Without Consulting With the Union at a Time When the Union Was the Authorized Representative of Its Employees and by Threatening Its Employees With Loss of Overtime Employment

The credited testimony [10] shows that on December 6, 1962, shortly after the Union was certified as the collective bargaining representative of respondent's employees, Duane Johnson assembled the employees and informed them that, provisions of the collective bargaining agreement to the contrary not-

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[10] Of the 10 or so employees who were present at the December 6, meeting, 5 were called as witnesses by the General Counsel. All 5 of these employees testified in support of the 8(a)(1) and (5) allegations in the Board's complaint against respondent (*supra*, p. 4). In an effort to rebut these allegations, respondent called as witnesses 3 supervisors, including its general manager, Duane Johnson. However, respondent did not call any rank and file employee to testify concerning these allegations. The Examiner stated that portions of Johnson's testimony were "quite implausible" (R. 21) and noted that the discrepancies between what Johnson charged the Wagon Wheel for his employees' salaries and what he paid the employees indicated that Johnson was "guilty of either sharp dealing or unforgivable laxity" (*ibid.*). The Trial Examiner also found that employees Denzer and Davis, whose testimony supported the General Counsel's position, testified "with every indication of accuracy and fairness" (*ibid.*). Accordingly, the Trial Examiner's credibility resolutions on this matter, which were upheld by the Board, are entitled to affirmance by the Court. *N.L.R.B.* v. *I.L.W.U., Local 10, et al.*, 283 F. 2d 558, 562-563 (C.A. 9).

withstanding, he would no longer pay them double-time for overtime work. Instead of attempting to contact representatives of the Union, which at that time was the employees' statutory bargaining representative, Johnson ordered the employees to sign an "agreement" by which they purported to waive their rights to receive doubletime and to work overtime for time and a half, and warned the employees that if they refused to sign the "agreement" he would eliminate overtime by the device of hiring additional employees. Virtually all of the employees signed the "agreement." Johnson's deliberate bypassing of his employees' statutory representative and his warning to the employees of economic reprisal clearly undermined the authority and position of the Union, abridged his employees' Section 7 rights to "bargain collectively through representatives of their own choosing," and clearly frustrated "the objectives of Section 8(a)(5) much as a flat refusal" to bargain. *N.L.R.B.* v. *Katz, et al.*, 369 U.S. 736, 743. Accordingly, it is incontrovertible that respondent's conduct amounted to a clear violation of Section 8(a)(1) and (5) of the Act. *N.L.R.B.* v. *Katz*, *supra; N.L.R.B.* v. *Howard-Cooper Corporation*, 259 F. 2d 558, 561 (C.A. 9); *Carpinteria Lemon Association* v. *N.L.R.B.*, 240 F. 2d 554, 557 (C.A. 9), cert. denied, 354 U.S. 909; *N.L.R.B.* v. *Bonham Cotton Mills*, 289 F. 2d 903, 904 (C.A. 5), and cases cited therein; *N.L.R.B.* v. *Yutana Barge Lines, Inc.*, 315 F. 2d 524, 529-530 (C.A. 9).

II. Substantial Evidence on the Record as a Whole Supports the Board's Findings That Respondent Violated Sections 8(a)(3) and (1) of the Act by Discharging Utra and Hoskins Because They Sought Union Support for Their Grievances

A. *Utra*

A careful analysis of the record amply supports the Board's conclusion that the Company discharged Utra because he successfully secured the intervention of the Union in his salary dispute with Duane Johnson, the Company's general manager. Thus, it is uncontested that, sometime in October, Utra discovered that he had been cheated out of $554 in wages and demanded reimbursement from Duane Johnson, who agreed to make Utra whole for the improperly withheld wages.[11] When Johnson subsequently reneged on his agreement and refused to honor Utra's claim, the latter sought the assistance of the Union's national headquarters, which referred the matter to its local business agent, Gene Crumley. Sometime thereafter, Johnson complained to Utra regarding the latter's appeal to the Union for assistance. While professing that he was not afraid of anything the Union might do because he had unnamed "friends" who would "back him (Johnson) up", Johnson offered to write Utra a check for the full amount due him but insisted that Utra would have to endorse the check and return it to him. When Utra refused to assist Johnson in this subterfuge, Johnson became angry,

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[11] As previously noted (pp. 5-6, n. 7), during the period November 1962-April 1963, the Company improperly withheld about $12,000 of its employees' wages.

cursed the Union's business agent, and indicated to Utra that his days with the Company were numbered (*supra*, p. 7). Johnson was as good as his word—the next day, Utra was laid off. The Board properly viewed this concurrence of discharge with protected activity as evidence that the discharge was unlawfully motivated. As has been stated in another case involving similar circumstances, "It stretches credulity too far to believe that there was only a coincidental connection between [the employee's protected activities] on Monday, Tuesday and Wednesday and the abrupt termination of [his] employment on Thursday . . . ." *Angwell Curtain Company* v. *N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7). Accord: *N.L.R.B.* v. *Tak Trak, Inc.*, 293 F. 2d 270 (C.A. 9), affirming 128 NLRB 876, 877, cert. denied, 368 U.S. 938.

Moreover, the testimony of company officials concerning the reason for Utra's layoff was confusing and contradictory, and thus lent support to the Board's finding that Utra's dismissal was motivated by unlawful considerations. Thus, General Manager Johnson testified that he had personally laid off Utra because he was an outside painter and there was not enough outside painting work to keep Utra busy. Johnson added that when he laid Utra off he told him that "work had slowed down" (*supra*, pp. 7-8). Contradicting Johnson, Foreman Fred Schultz testified that he, and not the general manager, had laid Utra off. Although Schultz testified that the reason for Utra's layoff was poor enameling work, he admitted that the enameling work had been completed at least a week, and possibly 2 or 3 weeks, before

Utra's layoff. Schultz further admitted that he had not mentioned Utra's alleged poor work to him or criticized his work in any way when he laid him off (*supra*, p. 8). Moreover, the record fully supports the Board's finding that Johnson's testimony was "confused, incoherent, and self contradictory" (R. 41). Thus, in discussing his January 24 conversation with Utra (*supra*, p. 7, n. 8), Johnson said that Utra had asked him to hold the money for him so that he (Utra) would not gamble it away, that Johnson subsequently wanted to pay Utra the withheld subsistence so that he (Utra) "wouldn't forget that I [Johnson] had it," and that Utra complained to the International only because Hoskins had convinced him that Johnson was going to "beat him out of" the money. Johnson then stated that he offered to repay the money to Utra at that time but had subsequently changed his mind almost immediately after making this alleged offer because Utra "got smart about it," and told Johnson that he wanted to enlist the support of the Union because "he thought he could get more out of it." Johnson also testified that under the collective bargaining agreement, Utra was not entitled to subsistence (R. 171-173). Johnson's assertion that he did not owe Utra any subsistence under the collective bargaining agreement is manifestly at odds with his testimony that he had held the money out, pursuant to an agreement with Utra, and that he subsequently wanted to return the money and offered to do so. It is also inconsistent with his payment to Utra, one month later, of the money the latter claimed. Similarly, Johnson's assertion that he had

begun to pay the subsistence money to Utra because he was afraid he would suffer a lapse of memory and forget to repay him, and his charge that he offered to pay Utra all the money owed him at that time but Utra declined his offer because he (Utra) thought that he could get more money out of Johnson by going to the International, is entirely beyond belief.[12]

Similarly, the record reveals a crucial inconsistency in Johnson's sworn statements regarding the reason for Utra's layoff. Thus, in his testimony at the Board hearing, Johnson asserted (*supra*, p. 7) that Utra was laid off because there was no more outside painting to keep him busy. However, in his prehearing affidavit, Johnson stated that Utra's layoff was occasioned by his poor enameling and paperhanging work (R. Exh. 1, p. 2-3). It is, of course, well settled that where an employer assigns inconsistent or obviously incredible reasons for the discharge or dismissal of an employee, the Board's inference that the employee was discharged for discriminatory or unlawful reasons is thereby strengthened. *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9), and cases cited therein. Therefore, the record amply supports the Board's conclusion that Utra's discharge was motivated by his dispute with Johnson over the

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[12] Utra credibly testified that while working for Johnson he had a savings account at a nearby bank and made deposits nearly every week into this account, and denied he asked Duane Johnson to hold any of his wages or subsistence for him (R. 236-238). Indeed, Utra's examination of Johnson's records makes it highly unlikely that Utra would give money to Johnson for safekeeping when a bank was available (see *supra*, pp. 5-6, n. 7).

payment of wages due him and Utra's attempt to have the Union intervene in his behalf. Accordingly, Utra's dismissal was manifestly in violation of Section 8(a)(3) and (1) of the Act. *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 451 (C.A. 9); *N.L.R.B.* v. *Symons Manfacturing Co.*, 328 F. 2d 835, 837 (C.A. 7). See *N.L.R.B.* v. *U.S. Divers Company*, 308 F. 2d 899, 905 (C.A. 9).

B. *Hoskins*

The record similarly supports the Board's finding that the discharge of Hoskins was also the result of his appeal to the Union for assistance in a salary dispute with Johnson. Thus, on December 6, Johnson delivered an ultimatum to the painters that they would be deprived of all overtime work unless they agreed to work overtime at time and a half instead of doubletime, as the collective bargaining agreement specified. Johnson then circulated a paper among the employees in which they purported to relinquish their rights to receive doubletime pay and requested them to sign it. Although a number of the painters signed this "agreement," Hoskins defied Johnson by telling him that he would not sign "the damn thing."

On the following day, Hoskins reported to the Union's business agent, Gene Crumley, that Johnson had deliberately refused to honor the terms of the collective bargaining agreement. Crumley visited the job site several days later and warned Johnson that the Union would not tolerate a unilaterally imposed reduction in the overtime rate specified in the

collective bargaining agreement. Shortly thereafter, Johnson must have learned that it was Hoskins who had reported his contract violations to the Union. For, according to uncontradicted testimony, Johnson assembled the employees and stated that one of them had complained to the Union and had gotten Johnson into trouble with Gene Crumley. Johnson left no doubt in the minds of the employees as to how he would deal with the offender: he informed the employees that he would find some pretext or other and dismiss the employee in question forthwith. Making it clear that his threat of dismissal was aimed directly at Hoskins, Johnson singled the latter out on two occasions during the meeting for special comment: first, Johnson looked directly at Hoskins and said that one of his employees had "put Gene Crumley on his back"; then, as he was leaving the meeting, just after his threat to dismiss the informant, Johnson looked at Hoskins, pointed at him and said, "I want you to remember that" (*supra*, p. 9).

In fulfillment of Johnson's threat, Foreman Fred Schultz laid Hoskins off the very next day, on clearly pretextual grounds. Thus, according to uncontradicted testimony, at the time he was laid off, Hoskins was told by Schultz that everyone receiving subsistence pay was being laid off. However, the Company's own payroll records show that this statement was not true and that employees drawing subsistence pay remained on respondent's payroll for months after Hoskin's dismissal (*supra*, p. 9). Accordingly, it was well within the Board's discretion to find

that Hoskin's dismissal, like Utra's, violated Section 8(a)(3) and (1) of the Act. See cases *supra*, p. 18.

C. *The Board's reversal of the Trial Examiner*

As noted above, the Trial Examiner recommended that the 8(a)(3) allegations in the complaint be dismissed on the grounds that the testimony of Company officials, particularly that of Foreman Fred Schultz and Robert Cleveland, that Hoskins and Utra had been dismissed for nondiscriminatory reasons, was credible. The record, however, fully supports the Board's conclusion that the testimony of Schultz and Cleveland, as well as that of General Manager Duane Johnson,[13] as to the discharges of Hoskins and Utra, were "so grossly confusing, self contradictory, equivocal, evasive, and in part apparently false, as to render such credibility findings wholly insupportable" (R. 39). Thus, as noted above (*supra*, pp. 15-16), Johnson and Schultz could not even agree upon who had laid Utra off, much less the reasons for his layoff. Johnson testified that Utra was laid off by himself because of a slowdown in outside painting work. On the other hand, Schultz testified that he had laid off Utra because of the latter's poor enameling work. Schultz's testimony on this point is clearly suspect because, as he himself acknowledged, he did not mention Utra's allegedly poor work to him when he laid Utra off, and because Utra, who was not laid off until January 25, had admittedly completed his enam-

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[13] For complete discussion of Johnson's testimony see *supra*, pp. 15-17.

eling work in the early or middle part of January. Moreover, Hoskins testified, without contradiction, that at the time of his layoff, he was informed by Foreman Schultz that the Company was laying off everyone who was drawing subsistence; the Company's own records (*supra*, pp. 9, 19) disclose that Schultz's explanation for Hoskins's discharge was without foundation in fact. Accordingly, his testimony relating to Hoskins's dismissal is clearly not worthy of being credited. Similarly, the discredited testimony of Schultz and Cleveland that no acts of unlawful interference occurred at the December 6 meeting (see R. 203-206, 222-224) scarcely supports the Examiner's recommendation that their testimony relating to the discharges of Utra and Hoskins be accepted at face value. For ". . . in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next." *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659.

It is true, as this Court has noted, that matters of credibility are generally for the trier of fact. *N.L.R.B.* v. *I.L.W.U., Local 10*, 283 F. 2d 558, 562. But this does not mean that the Board must "rubber stamp" a trial examiner's credibility resolutions when its own careful analysis of the record discloses deficiencies in the examiner's analysis which "create doubts with respect to the truthfulness of a witness so powerful that they outweigh any evaluation based on demeanor." *N.L.R.B.* v. *Jackson Maintenance Corp.*, 283 F. 2d 569, 570 (C.A. 2). As we have shown, this is just such a case and the Board, relying

on the entire record, including the discrepancies and obvious untruths in the testimony of respondent's witnesses, properly overruled the Trial Examiner and found the discharges to have been discriminatorily motivated. *N.L.R.B.* v. *Jackson Maintenance Corp., supra; N.L.R.B.* v. *Pacific Intermountain Express Co.*, 228 F. 2d 170, 172-174 (C.A. 8), cert. denied, 351 U.S. 952; and see *Utica Observer-Dispatch, Inc.* v. *N.L.R.B.*, 229 F. 2d 575, 577 (C.A. 2). We submit that the Board's findings are supported by substantial evidence on the record considered as a whole and, accordingly, that they are entitled to affirmance on review.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.[14]

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National Labor Relations Board.

November 1966.

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[14] Respondent contended before the Board that its refusal to pay the overtime rates specified in the collective-bargaining agreement was a contractual violation redressable in the courts, rather than an unfair labor practice under the jurisdiction of the Board. This contention is wholly without merit. As the Examiner noted (R. 22), "The gravamen of this case is that the Company's course of conduct bypassed the certified collective bargaining representative of the employees and undermined the entire statutory relationship between the employees and their collective bargaining representative. . . . The purpose of this proceeding is to enforce the statutory mandate to bargain collectively and it is only incidental that part of the remedy will make whole employees who have been deprived of wages by the Company's [violation of the contract]." It is, of course, well settled that the existence of other tribunals which might be able to hear the case and afford relief to the parties in no way affects the exclusive jurisdiction of the Board to remedy unfair labor practices, as such. Section 10(a) of the Act; *Local 174, Teamsters, etc.* v. *Lucas Flour Co.*, 369 U.S. 95, 101, note 9; *Garner* v. *Teamsters, etc.*, 346 U.S. 485, 489-491. And see *Smith* v. *Evening News Assn.*, 371 U.S. 195, 197.

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying,

and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Pursuant to Rule 18(f) of the Rules of the Court

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Received In Evidence
1-A through 1-M	7	7
2	8	9
3	9	10
4, 5 and 6	11	31
7	12	31
8	32	32
9	32	34
10	104	130
11	105	130
12	116	117
13	153	

RESPONDENT'S EXHIBITS

1	265	265
2	265	265
3	265	265
4	240	240

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